No. 248.

Dale

Brief of Harlock for P. C.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

Filed Feb. 25, 1899.

MAUDE E. KIMBALL,
Plaintiff in Error,

against

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET I. JAMES,
Defendants in Error.

No. 248.

In Error to the Surrogate's Court of the County of Kings, State of New York.

BRIEF FOR PLAINTIFF IN ERROR.

WALDEGRAVE HARLOCK,
GEORGE BELL,
For Plaintiff in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1898.

MAUDE E. KIMBALL,
Plaintiff in Error,

AGAINST

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET I. JAMES,
Defendants in Error.

BRIEF FOR MAUDE E. KIMBALL, PLAINTIFF IN ERROR.

Statement.

This case is brought to this Court by writ of error to the Surrogate's Court of the County of Kings, in the State of New York.

The plaintiff in error presented a **Petition** to said Surrogate's Court on the 17th day of December, 1896, alleging that she was the widow of one Edward C. Kimball, who died intestate in the said County of Kings on the 9th day of November, 1896, and praying that letters of administration upon his estate theretofore issued to two of the defendants in error, Harriet A. Kimball and John S. James, be revoked and that such letters be issued to her as such widow, the former letters having been issued without notice to her (Transcript, p. 2).

To this petition the defendants in error pleaded by **Answer** that although there had been a ceremony of marriage performed between plaintiff in error and said Edward C. Kimball during his lifetime that the plaintiff in error had previously married one James L. Semon, and also that she had, four years before said ceremony of marriage, obtained a decree of divorce against said Semon in the State of North Dakota, but that said Semon was not a resident of that State and was not served with process in said action within the said State and that he did not appear in said action, and that thereby the decree of divorce entered in said action, prior to the marriage ceremony between plaintiff in error and the deceased, was absolutely void (Transcript, p. 12). A copy of the record in the divorce action as the same stood prior to amendment thereof was annexed to this answer and marked "Exhibit A."

To this answer plaintiff in error pleaded by **Reply** (Transcript, p. 28) denying that said Semon did not appear in the divorce action and alleging that the record in the divorce action was not fully presented in the answer of the defendants in error, that by inadvertence and mistake the appearance of said Semon was not recited in the decree of divorce as originally entered, but that thereafter, and before the commencement of this proceeding before the Surrogate, said decree was duly amended *nunc pro tunc* as of the date of the original decree, so as to recite the appearance of said Semon in said divorce action. An exemplified copy of the papers on the motion for amendment and the order thereon and of the decree as amended were annexed to said reply as exhibits (Transcript, pp. 31 to 44).

Issue having been joined on these pleadings, the matter came on for **trial** before the Surrogate, whereupon

the defendants in error, having the affirmative of the issue, read in evidence an exemplified copy of the judgment roll in the divorce action as it stood prior to amendment. The plaintiff in error then read in evidence exemplified copies of the amended decree and of the proceedings upon which the amendment was granted, and also extracts from the laws of North Dakota. Both parties having admitted on the record certain matters of no materiality here, the trial was then closed (Transcript, pp. 45, 46).

The widow of a person dying intestate is, by the laws of New York, entitled as a matter of right to administration upon his estate.

Section 2260, Code of Civil Procedure of the State of New York, is as follows: "Administration in case of intestacy must be granted to the relatives of the deceased entitled to succeed to his personal property who will accept the same in the following order: (1) to the surviving husband or widow; (2) to the children, (3) to the father" * * *

The learned Surrogate was, therefore, called upon to decide in this proceeding the question whether the plaintiff in error was or was not the widow of the deceased. The Surrogate in his **decision** made a finding of fact as follows:

"Eighth: After the death of said Edward C. Kimball, and in December, 1896, the said James L. Semon applied to the Court of North Dakota which granted the decree of divorce, to have a letter, which he sent to the plaintiff's attorneys after receiving the summons in the divorce action, filed in said Court as his answer in the divorce suit *nunc pro tunc* as of the date of its receipt by the plaintiff's attorneys, and to have said decree of divorce, made on the 26th day of January, 1891, amended *nunc pro tunc* as of that date, by striking out the recital to the effect that the defendant failed to answer, demur

or make any appearance in said divorce suit, and by inserting in place thereof the following words: 'The defendant having appeared herein and answered and submitted himself to the jurisdiction of the Court.' Notice of said application was given only to the attorneys who appeared for the plaintiff in that divorce suit, and an order was made by the said Court on the 16th day of December, 1896, on default of the plaintiff, granting said application, and purporting to amend said decree of divorce *nunc pro tunc* in accordance with said application, but said Court did not have the power or jurisdiction to make such an order." (Transcript, p. 56.)

And he found as a conclusion of law as follows:

"Second: The Court of North Dakota did not have jurisdiction to make said order of December 16th, 1896, amending the said decree of divorce *nunc pro tunc*, and said order was and is a nullity" (Transcript, p. 56).

Said Surrogate also delivered an opinion stating as follows:

"Moreover, I am of the opinion, upon the UNDISPUTED FACTS, that the North Dakota Court had not "jurisdiction to make the amendment.

"The letter which is in evidence and referred to as "constituting the appearance of the defendant is not in "any sense or upon any theory of practice an appearance in the suit. It is not entitled, is improperly verified, contains no demand for relief, and does not even "contain any intimation of any intention on the part "of the defendant to appear and submit himself to the "jurisdiction of the Court. It is a mere verified letter "and nothing more" (Transcript, p. 54).

The Surrogate upon the above reasoning found that Semon did not appear in the action, that, therefore, the *divorce was invalid*, and that plaintiff in error was not lawfully married to Edward C. Kimball and could not lawfully marry him, because she was the wife of Semon and was not the widow of said Kimball, and a decree was accordingly entered denying the prayer of the petition of

plaintiff in error and declaring that she was not the widow of the deceased (Transcript, p. 57).

Exceptions were duly taken to each and every of the findings of fact and conclusions of the Surrogate, and to his refusals to find, (Transcript, pp. 61 to 64), and an appeal was prosecuted by the plaintiff in error to the Appellate Division of the Supreme Court where the decree was affirmed. The opinion of the Appellate Division declared that the question whether Semon in fact appeared in the divorce action was open to collateral attack, and that the Surrogate having found as a matter of fact that Semon did not appear, the Court saw no reason to differ with him in that finding (Transcript, p. 72, fols. 117, 118). An appeal was then taken by plaintiff in error to the Court of Appeals of the State of New York. That Court affirmed the decree. The **opinion** of the majority of the Court stated that whether or not Semon appeared in the divorce action was a question of fact and that the Court was prohibited from reviewing a question of fact (Transcript, p. 85).

Chief Justice PARKER of the Court of Appeals, however, wrote a **dissenting opinion** stating that the North Dakota Court having adjudicated that Semon did appear in the action, and such adjudication having been based upon evidence tending to support it, it was not competent for the Courts of New York State *without any evidence other than that presented to the North Dakota Court* to hold otherwise. He said:

"In granting the order to amend the decree *nunc pro tunc* upon the motion of the defendant in the action, the Court necessarily decided what the evidence before it asserted, viz., that the jurisdictional facts existed at the time the original decree was entered. The motion papers tend to show that such was the fact. It was not then disputed, nor has it since been questioned by evidence" * * * (Transcript, p. 88, fol. 150).

Chief Justice PARKER further said:

"It is suggested that the learned Surrogate's Court "found as a fact that there was no appearance by the "defendant Semon in that action and that we are con- "cluded by his finding. The Surrogate found the facts "to which I have already referred, and because he saw "fit to insert among his findings of fact his conclusion "of law that the defendant did not appear, does not "deny to us the right, nor relieve us from the duty, of "determining what conclusion of law the facts really de- "manded" (Transcript, p. 89).

A decree of affirmance having been entered by the Surrogate upon the remittitur from the Court of Appeals (Transcript, p. 74) a writ of error was sued out of this Court (Transcript, p. 76).

The questions involved require that we should now make a **statement of the facts presented to the North Dakota Court** upon the application of James L. Semon to amend the original decree of divorce. Said Semon on December 16, 1896, presented a petition to the North Dakota Court praying for an amendment of the decree so as to recite his appearance in the divorce action instead of reciting his default to appear therein (Transcript, p. 36). Said petition alleges among other things:

"And your petitioner, desiring to appear in said "action and to answer said complaint as required by "said summons, did on the 23rd day of October, 1890, "at the City of New York aforesaid, where your peti- "tioner then resided, prepare, make and sign his answer "to the said complaint, and did subscribe and swear to "the same on the 23rd day of October, 1890, before "James T. Clark, a Notary Public in and for the City "and County of New York, duly commissioned by law "to take oaths and acknowledgments in the said City and "County; and on the said 23rd day of October, 1890, "your petitioner served by mail his said answer upon

"Winterer & Winterer, attorneys for plaintiff, by per-
"sonally depositing in the postoffice in the said City of
"New York his said answer, enclosed in a sealed en-
"velope. with the postage prepaid, addressed to Win-
"terer & Winterer, attorneys for the plaintiff, at Valley
"City, North Dakota. That a copy of said answer is
"hereto annexed marked 'A.'

"That your petitioner prepared and sent said answer
"without the aid or advice and without consultation
"with any counsellor or attorney at law, in order to
"avoid the expense thereof; and with the intention to
"have the said answer presented to this court so as to
"inform the Court of your petitioner's position and de-
"fense in this action, and to submit himself to the juris-
"diction of the Court herein, and to have his rights
"adjudicated by this Court without incurring any ex-
"pense in the matter. That your petitioner believed
"that said answer so subscribed and sworn to by him
"and sent to plaintiff's attorneys would be filed in Court
"as part of the proceedings herein; but your petitioner
"has learned within the last few days, for the first time,
"that the same was not filed, and your petitioner has
"never been aware until now of the recitals of his de-
"fault in the decree as aforesaid, and has never been
"served with a copy of said decree.

"That your petitioner is informed and believes that
"the plaintiff, Maude E. Semon, relying upon said
"decree, married one Edward C. Kimball on the 29th
"day of June, 1895; but your petitioner has not married
"since said decree was made, and being a resident and
"citizen of the State of New York at the time of the
"service on him of the summons as aforesaid, and ever
"since, your petitioner is now advised by counsel that
"it would be impossible for him to marry again in view
"of the erroneous recital in the decree as aforesaid to
"the effect that your petitioner did not appear or answer
"in said action but made default therein, as the laws of
"the State of New York do not regard a decree of di-
"vorce against a non-resident defendant granted by de-
"fault by the courts of another State as of any binding
"effect outside of the State in which it was granted, in
"cases where there is no appearance in the action by the
"non-resident defendant or no service of process on him
"within the State wherein the decree is granted.

"That your petitioner desires that his said answer, "or the copy thereof hereto annexed, be filed herein "*nunc pro tunc* by leave of this Court, and that said "decree be amended *nunc pro tunc* so as to recite the "appearance of your petitioner in order that said decree "may conform to the facts as they existed at the time "it was granted, and may show upon its face that your "petitioner appeared and answered and submitted him-"self to the jurisdiction of this Court in this action. "Your petitioner desires thereby to make the decree of "as binding effect in the State of New York where your "petitioner resided when said action was commenced "and ever since has resided, as said decree has in the "State of North Dakota, and in order that your peti-"tioner may not violate the laws of the State of New "York in case of his re-marriage at any time hereafter "to any person other than the plaintiff during her life-"time" (Transcript, pp. 36 and 37).

Exhibit A mentioned in said petition and attached thereto is as follows:

NEW YORK, Oct. 23, '90.

MR. HERMAN WINTERER:

DEAR SIR: In reply to the contents of paper served on me Oct. 15, 1890, by your representative, relative to my wife and children, I would say that my wife has sworn to matters untrue. For instance, this matter of desertion, this is surprising to me, as my wife personally ordered me from the house and stated that she never wished to see me again, this was the fore part of September, 1889. I did as I was ordered, having no alternative, as I was living under her mother's roof. Now is it at all likely that a domesticated man (as my wife will tell you I was) would give up a good home, without good reasons for so doing? It was only a short time after I left the house, that they moved and took up another dwelling place, I never receiving any notification where I could see my children. I have meditated over this matter more than once, and have often wondered why it was

done. It is now over a year ago, since I saw my children last.

In relation to my not providing for her I would say, that I have always given what I had, and very often more than I could afford. I am now carrying on the painting business which was left to me by my father who is now dead. When I came into possession of the business it was very much in debt. I have been trying ever since I took it to wipe out this burden, but as yet have not fully accomplished my aim and desire. There were times when I was not doing very much in my business, and consequently could not provide as promptly as I would like to. My wife swearing that I did not provide for her the common necessaries of life simply tells an untruth.

As to my drinking habits, I will admit that I have indulged a little too much at times, but now have got bravely over that, having not tasted it in over a year. As the father of my children I was glad to hear of their existence, and hope in the near future of having the pleasure of seeing my own flesh and blood.

Very respectfully,

JAS. L. SEMON,
803 9 Ave., N. Y. C.

City and County of New York, ss.:

JAMES L. SEMON, being duly sworn, deposes and says that he is the writer of the foregoing letter, that he knows the contents thereof, and that it is absolutely true in every particular.

JAS. L. SEMON. [SEAL.]

Subscribed and sworn to before me this 23rd day of October, 1890.

JAS. T. CLARK,
[L. S.] Notary Public,
For Co. of N. Y.

(Transcript, p. 40.)

The questions involved in this case are as follows:

(1.) The primary question is: Is the plaintiff in error the widow of Edward C. Kimball, deceased?

(2.) This question depends upon the validity of the divorce of plaintiff in error from her first husband James L. Semon.

The validity of that divorce depends,

(*a*) Upon the jurisdiction of the North Dakota Court irrespective of the appearance of James L. Semon therein; and

(*b*) Upon the power of the North Dakota Court to amend its decree, upon the facts presented to it, so as to recite the appearance of James L. Semon.

(3.) The right of the Courts of the State of New York to declare the decree of divorce a *nullity*, either as originally entered or as amended, in view of the provisions of the Constitution of the United States, Section 1, Art. IV., and of the Acts of Congress relating to the proof and effect of judgments of one State in other States.

(4.) The right of the Courts of the State of New York to adjudicate that the evidence presented to the North Dakota Court, tending to sustain the adjudication of such North Dakota Court that James L. Semon appeared in the divorce action was insufficient and did not constitute an appearence either in fact or in law and to hold that the adjudication of appearance was erroneous in law.

(5.) All of these questions may be summed up in the question, was full faith and credit given by the Courts of New York to this judgment or judicial proceeding in the Court of North Dakota?

These questions were raised by exceptions duly filed to each and every of the findings of fact and conclusions of law of the Surrogate and to his refusals to find (Transcript, pp. 61 to 64) and by the assignment of errors herein (Transcript, pp. 79, 80).

SPECIFICATION OF ERRORS.

I.

The Surrogate erred in his judgment or decree in adjudicating "that Maude E. Kimball is not the widow of Edward C. Kimball, deceased, and is not entitled as his widow to letters of administration of the goods, chattels and credits which were of Edward C. Kimball deceased" (Transcript, p. 58) and in his conclusion of law to that effect (5th Conclusion, Transcript, p. 57) for the reason *that the decree of divorce granted to Maude E. Semon, now Maude E. Kimball, by the District Court of the fifth judicial district of the State of North Dakota, dated the 26th day of January, 1891, in the action of Maude E. Semon, plaintiff,* vs. *James L. Semon, defendant, dissolving the bonds of matrimony between said Maude E. Semon and James L. Semon, was a good and valid decree and was not void.*" (1st Assignment of Errors, Transcript, p. 79.)

The Surrogate refused so to find when requested by plaintiff in error (Tenth Request, Transcript, p. 60),

to which refusal plaintiff duly excepted (23d Exception, Transcript, p. 63) and like exception was taken to said conclusion of law (14th Exception, Transcript, p. 63).

II.

The Surrogate erred in his judgment or decree in finding as a conclusion of law that the Court of North Dakota did not acquire jurisdiction of James L. Semon, and that the decree of divorce made by said Court was a nullity (First Conclusion, Transcript, p. 56) for the reason *that the said decree of divorce granted by the District Court of the Fifth Judicial District of the State of North Dakota, dated January 26th, 1891, dissolving the bonds of matrimony between James L. Semon and said Maude E. Kimball, therein called Maude E. Semon, was, prior to the amendment thereof and as and in the form and manner in which said decree was originally made, signed, entered, and docketed, a good and valid decree, and was not void, and was binding upon the parties to this proceeding, and that the said Surrogate's Court and other aforesaid Courts in the State of New York erred in not so holding and in not making a decree herein accordingly* (2nd Assignment of Error, Transcript, p. 79). This conclusion of law was duly excepted to by plaintiff in error (Transcript, p. 62, Tenth Exception).

III.

The Surrogate erred in his judgment or decree in finding as a conclusion of law that the Court of North

Dakota did not have jurisdiction to make the order amending said decree of divorce *nunc pro tunc* and that said order was and is a nullity (2nd Conclusion, Transcript, p. 56) for the reason *that the decree of divorce granted by the District Court of the Fifth Judicial District of the State of North Dakota, dated January 26th, 1891, dissolving the bonds of matrimony between James L. Semon and said Maude E. Kimball, in said decree called Maude E. Semon, as amended nunc pro tunc as of the date of its original entry, was a good and valid decree, and the order of said Court, directing said amendment, dated December 16, 1896, was a good and valid order, and the same were not, nor was either of the same, void, and that the said Surrogate's Court and said other Courts in the State of New York erred in not so holding and in not making a decree herein accordingly* (3rd Assignment of Error, Transcript, p. 79). Exception to such conclusion of law was duly taken (11th Exception, Transcript, p. 62).

IV.

The Surrogate erred in his judgment or decree in finding as a matter of fact that said James L. Semon did not appear in said divorce action in person or by attorney and in finding as a conclusion of law that the Court of North Dakota did not acquire jurisdiction of said James L. Semon in said divorce action and that the decree of divorce made by said Court was and is a nullity (4th Finding of Fact, 1st Conclusion of Law, Transcript, pp. 55, 56), for the reason *that the recital and finding in said decree of the said District Court of the Fifth Judicial District of the State of North Dakota,*

that James L. Semon, the defendant in the divorce action, appeared and answered in said action and submitted himself to the jurisdiction of said Court was an adjudication duly made by said Court, and that full faith and credit to such adjudication should have been, but were not, given by the aforesaid Courts in the State of New York in this suit or proceeding and in the final order or decree herein, pursuant to the Constitution of the United States and the Acts of Congress as aforesaid. Exception to such finding of fact was duly taken (5th Exception, Transcript, p. 62). Exception to such conclusion of law was duly taken (10th Exception, Transcript, p. 62).

V.

The Surrogate erred in his judgment or decree in finding as a conclusion of law that plaintiff in error was when she entered into the marriage ceremony with said Edward C. Kimball the wife of James L. Semon and could not and did not contract a lawful marriage with said Edward C. Kimball, and that said plaintiff in error is not the widow of said Edward C. Kimball and not entitled as such widow to letters of administration upon his estate (Conclusions 4th and 5th, Transcript, p. 57), for the reason *that by the force and effect of said decree said Maude E. Semon, now Maude E. Kimball, was not the wife of James L. Semon when she married Edward C. Kimball, and by such marriage she became the lawful wife of Edward C. Kimball, and upon the decease of said Kimball she became his lawful widow* (5th Assignment of Errors, Transcript, p. 80).

That said Surrogate erred in his judgment or decree

VI.

in finding as a matter of fact that the Court of North Dakota did not have the power or jurisdiction to make the order of the 16th day of December, 1896, amending the decree of divorce *nunc pro tunc* (8th Finding of Fact, Transcript, p. 56), and also erred in refusing to find that said decree was duly amended (13th Request to find, Transcript, p. 60), for the reason *that in violation of Section I of Article IV of the Constitution of the United States and of the Acts of Congress relating to the proof and effect of the judicial proceedings of one State in other States, the Courts in the State of New York, to wit, the Surrogate's Court of the County of Kings, in said State, the Appellate Division of the Supreme Court of said State, in the Second Judicial Department, and the Court of Appeals of said State, in the suit or proceeding at bar and in the final order or decree therein did not give full faith and credit to the said decree of divorce nor to said order amending the same, nor to the record and judicial proceedings of the State of North Dakota in the aforesaid action of Maude E. Semon versus James L. Semon, in which said decree or divorce and order were made* (6th Assignment of Error, Transcript, p. 80). The 8th finding was duly excepted to (9th Exception, Transcript, p. 62). The 13th refusal to find was duly excepted to (26th Exception, Transcript, p. 64).

VII.

The Surrogate erred in his judgment or decree in finding as a conclusion of law that the Court of North

Dakota did not acquire jurisdiction of the said James L. Semon in the divorce action and that the decree of divorce made by said Court was a nullity (1st Conclusion, Transcript, p. 56), for the reasons assigned in the VI assignment of errors and printed in italics in specification VI (*supra*). Exception to such finding was duly taken (10th Exception, Transcript, p. 62).

VIII.

The Surrogate erred in his judgment or decree herein in finding as a conclusion of law that the order of the North Dakota Court amending the decree of divorce *nunc pro tunc* was not and is not binding on the defendants in error and did not affect or impair their rights or interest as next of kin of said Edward C. Kimball (3d Conclusion, Transcript, p. 56), for the reasons set out in the II and III assignment of errors herein which assignments are printed in italics in specifications II and III (*supra*). This conclusion was duly excepted to (12th Exception, Transcript, p. 62).

IX.

The Appellate Division of the Supreme Court of the State of New York, for the reasons aforesaid, erred in its judgment affirming the decree of the Surrogate.

X.

The Court of Appeals of the State of New York, for the reasons aforesaid, erred in its judgment affirming the order and judgment of the Appellate Division.

ARGUMENT.

FIRST.

No evidence having been introduced to impeach the facts upon which the District Court of North Dakota acted in adjudging that James L. Semon appeared in the divorce action, it was error for the Surrogate to decree that there was no such appearance, because Section I of Article IV of the Constitution of the United States declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

The full faith and credit referred to means the same faith and credit that a judgment or judicial proceeding has in the State from whence it was taken. Christmas *vs.* Russell, 5 Wall., 302; Hampton *vs.* McConnell, 3 Wheaton, 234; Cheever *vs.* Wilson, 9 Wall., 109.

I.—The record before the Surrogate presents an amended decree in the divorce action which was in existence at the time these proceedings were instituted, and upon the subject of the defendant's appearance the recital therein is as follows: "The defendant having appeared herein and answered and submitted himself to the jurisdiction of the Court." When this amended decree was put in evidence, therefore, it was established presumptively that the Court making the decree had acquired jurisdiction over the defendant by his appearance therein. It was a presumption rebuttable by proper evidence, if such existed, but in the absence of

evidence tending to disprove the assertion of the decree that the defendant had appeared and answered and submitted himself to the jurisdiction of the Court, it was conclusive. It was not attacked by evidence; indeed, *there was no evidence in the Surrogate's Court upon the subject* except the papers which were submitted to the Dakota Court on the motion made by the defendant Semon to amend the decree in respect to the recital referred to. If the judgment, when first entered, had been in the form in which it now is, as respects the recital, no one would have thought of challenging it, certainly not without direct evidence in possession of the attacking party tending to show that there was no appearance. The evidence upon which the North Dakota Court based its decision allowing the amendment was before the Surrogate, and it cannot be said that it does not furnish support for the determination of the North Dakota Court. In granting the order to amend the decree *nunc pro tunc* upon the motion of the defendant in the action, the North Dakota Court necessarily decided what the evidence before it asserted, viz.; that the jurisdictional facts existed at the time the original decree was entered. The motion papers tend to show that such was the fact. It was not then disputed, *nor has it since been questioned by evidence.*

II.—The following discussion of the amendment proceedings, will show that the evidence before the North Dakota Court was an adequate basis for its adjudication on that subject.

The North Dakota Court is a Court of general jurisdiction (Transcript, p. 47, sec. 41, and Transcript, p. 50, secs. 4817-4824, 4825), and had jurisdiction of the person of the plaintiff and of the subject matter of

the divorce action. A decree of divorce in favor of the plaintiff was originally entered therein reciting the service of process upon the defendant without the State of North Dakota and the failure of defendant to appear or answer. Sometime after the entry of this decree the defendant in that action presented a petition to that Court praying that the decree be amended so as to state his appearance. The petition showed that immediately after service of process upon him without the State he had prepared an answer to the complaint without the aid of a lawyer and signed and sworn to the same and had sent the same by mail to the plaintiff's attorneys as required by the terms of the summons served upon him. Annexed to his petition was a copy of the answer, the same being in the form of a letter, attached to which was an affidavit verifying the truth of the same (Transcript, pp. 36 to 40).

The verified answer or letter refers intelligently to the summons and complaint. Its opening sentence is, "In reply to the contents of paper served on me Oct. 15, 1890, by your representative relative to my wife and children."

The summons and complaint was the paper served on Oct. 15, 1890 (Transcript, p. 22).

The letter then takes up the allegations of the complaint *seriatim*. He first replies to the first charge in the complaint, that of desertion, and specifies as to the same that it is one of the matters that the plaintiff, his wife, has sworn to which is untrue, and he states the facts to be that he was ordered from his wife's house and left because he had no other alternative.

He next replies to the second charge in the complaint, that of neglect to provide for the plaintiff, and states that he has always given what he had and that

"my wife swearing that I did not provide for her the common necessaries of life simply tells an untruth."

He next replies to the third charge of the complaint, that of the use of intoxicating liquor, and states that while formerly indulging a little too much he has not tasted it in over a year.

Having thus answered each charge in the complaint he swore to the truth of the answer, and in accordance with the command of the summons to serve a copy of his answer on the plaintiff's attorneys (Transcript, p. 19), he duly mailed the same to them and it was duly received by them (Transcript, p. 33).

This letter or answer was not filed by plaintiff's attorneys, but they caused judgment to be entered in the divorce action reciting the default of the defendant to appear or answer.

The petition of Semon alleges that he sent this answer or letter desiring to appear in the said action and to answer said complaint as required by the summons and with the intention to have said answer presented to the North Dakota Court so as to inform that Court of his defense in the action, and to submit himself to the jurisdiction of the Court, and to have his rights adjudicated without incurring any expense in the matter, and that he believed that said answer would be filed in Court as a part of the proceedings. He further alleged in his petition that he only learned within a few days of the date of his petition (Dec. 1, 1896,) that the answer had not been filed and of the recital of his default in the decree, and also that although plaintiff had remarried since said decree, he was advised by counsel that it would be impossible for him to marry again in view of the recital of his default to appear and of the service of the process in the action upon him without

the State. He, therefore, asked to have the decree amended so as to recite his appearance, to the end that in case of his remarriage it would not be any (apparent) violation of the laws of New York.

With the petition was presented an affidavit of one of plaintiff's attorneys to the effect that he had received the verified letter or answer of defendant as claimed, but had not presented the same to the Court because of the informal nature thereof (Transcript, p. 33). On these papers a motion was made on notice to the plaintiff's attorneys for an amendment of the decree *nunc pro tunc*. The motion was granted and an order made directing that the decree be amended by striking out the recital of defendant's default to appear and answer and by substituting in place thereof the words "the defendant having appeared herein and answered and submitted himself to the jurisdiction of the Court" (Transcript, p. 32), and the decree was amended accordingly (Transcript, p. 41).

The North Dakota Court, therefore, acted upon evidence tending to prove that Semon appeared in the action. That Court was called upon to decide whether or not the facts presented by Semon constituted an appearance. Their determination of the legal effect of Semon's acts cannot be questioned collaterally in the Courts of another State. The facts presented by Semon to establish that he appeared may be impeached *by evidence* in the Courts of another State and upon *new evidence*, if any, tending to show that he did not in fact send the verified letter, or did not in fact do what he alleges he did, a different conclusion might, perhaps, be legitimately reached upon the question of his appearance. No principle or authority, however,

exists which declares that the Courts of one State may, *without new evidence*, treat as void an adjudication of appearance made by a Court of a sister State, where it has any evidence to support it, or may decide, as a matter of law, that the evidence upon which the adjudication was made was insufficient to sustain the judgment of such sister State. On the contrary, both principle and authority declare that full faith and credit must be given to such judgment and that this extends to and covers an adjudication of appearance made upon any evidence, even where the Courts of another State may be of the opinion that such adjudication, on the facts presented to the Court making such adjudication, was erroneous.

In New Lamp Chimney Co. *vs.* Ansonia Brass & Copper Co., 91 U. S., p. 656, this Court said:

"Void proceedings, of course, bind no one not es-
"topped to set up the objection, and in order to estab-
"lish the theory that the proceedings in this case are
"void the plaintiffs deny that the President of the cor-
"poration was authorized to make and file a petition
"in the District Court (McCormack *vs.* Pickering, 4
"Comstock, 279).

"Such a petition might properly be made by the
"President of the company and be by him presented to
"the District Court, if he was thereto duly authorized at
"a legal meeting called for the purpose by a vote of a
"majority of the corporators, and whether he was so
"authorized or not was a question of fact to be deter-
"mined by the District Court to which the petition was
"presented; and the rule in such cases is that if there be
"a total defect of evidence to prove the essential fact,
"and the Court find it, without proof, the action of the
"Court is void, but when the proof exhibited has a legal
"tendency to show a case of jurisdiction, then, although
"the proof may be slight and inconclusive, the action of
"the Court will be valid *until it is set aside by a direct*
"*proceeding for that purpose.* Nor is the distinction un-
"substantial, as in the one case the Court acts without
"authority and the action of the Court is void; but in

"the other, the Court only errs in judgment upon a "question properly before the Court for adjudication, "and, of course, the order or decree of the Court is only "voidable.

"Staples *vs.* Fairchild, 3 Comstock, 46.
"Muller *vs.* Brinckerhoff, 4 Denio, p. 119.
"Voorhis *vs.* Bank, 16 Peters, p. 473.
"Kinnier *vs.* Kinnier, 43 N. Y., 539."

In York vs. Texas, 137 U. S., 15, BREWER, J., speaking for this Court, said:

"The State has full power over remedies and pro- "cedure of its own Courts and can make any order it "pleases in respect thereto, provided the substance of "right is secured without unreasonable burden to parties "and litigants (Antoni *vs.* Greenhow, 107 U. S., 769). "* * * Can it be held that legislation simply for- "bidding the defendant to come into court and challenge "the validity of service upon him in a personal action "without surrendering himself to the jurisdic on of the "Court, but which does not attempt to restrain him from "fully protecting his person his property and his rights "against any attempt to enforce a judgment rendered "without due service of process and, therefore, void, "deprives him of liberty or property within the prohi- "bition of the Fourteenth Amendment? We think "not."

This rule was reiterated and followed in

Kaufman *vs.* Walthers, 138 U. S., 285.
Jones *vs.* Jones, 108 N. Y., 415.

In Jones *vs.* Andrews, 10 Wall., 377, this Court held that an objection to the jurisdiction and to the merits was a voluntary general appearance.

In Cheever *vs.* Wilson, 9 Wallace, 109, the Court said, at page 123, discussing the question of jurisdiction:

"That she did not live in the county where the petition

"was filed is expressly found by the decree. Whether "this finding is conclusive or only *prima facie* sufficient "is a point on which the authorities are not in harmony. "We do not deem it necessary to express an opinion "upon the point. It is clearly sufficient *until overcome* "*by adverse testimony.* None adequate to that result "is found in the record. Giving to what there is the "fullest effect, it only raises a suspicion that *animus* "*manendi* may have been wanting."

In Laing *vs.* Rigney, 160 U. S., 531, this Court quoted with approval the language used in Kinnier *vs.* Kinnier, 45 N. Y., 535, as follows:

"A judgment of a sister State cannot be impeached "by showing irregularities in the form of proceedings "or a non-compliance with some law of the State where "the judgment was rendered relating thereto or that "the decision was erroneous. Jurisdiction confers "power to render the judgment and it will be regarded "as valid and binding until set aside in the Court in "which it is rendered."

This principle was followed in New York in

Dunston *vs.* Higgins, 138 N. Y., 76.
Pendleton *vs.* Weed, 17 N. Y., 72, 75, 79.

SECOND.

There is no hard and fast rule as to what constitutes an appearance in an action.

I.—The Codes of Procedure both in New York and North Dakota make a "voluntary appearance" equivalent to personal service of the summons, but do not define what shall constitute a voluntary appearance (Sec. 4904; Transcript, p. 51).

The North Dakota Court adjudged on the facts here

that there was a voluntary appearance by the defendant Semon. In a somewhat weaker case a New York Court adjudged that an unverified letter written to plaintiff's attorney constituted a voluntary appearance by the defendant.

Pignolet *vs.* Deveau, 2 Hilt., 584.

And see

Quick *vs.* Merrill, 3 Cai., 133 (N. Y.).
Bailey *vs.* Arnold, 9 How. Pr., 445 (N. Y.).

The Encyclopedia of Pleading and Practice, Vol. 1, p. 633, says: "To constitute an appearance any act evincing an intention to appear is sufficient; and that any pleading to the merits by an answer or plea or in any informal manner attacking plaintiff's case is a general appearance (*Id.*, p. 636).

In Brink *vs.* Brink, 8 Kulp., 367, (Com. Pleas, Pa., 1896), a case very much like the case at bar, the Court ordered that the appearance of the defendant domiciled in another State be entered *nunc pro tunc*, after a decree of divorce, when she had in fact appeared *or authorized an appearance.*

What shall constitute a voluntary appearance not having been specified in the Code of Procedure of the State of North Dakota, it was competent for the Court of that State to pass upon the facts presented by Semon and to determine their legal effect.

A study of the Statutes of the State of North Dakota fails to reveal any substantial omission in the document prepared by the defendant Semon as his answer, or failure to observe any substantial requirement of those statutes.

Sec. 4893 (Transcript, p. 50) requires the defendant

to be summoned to serve a copy of his answer on the person whose name is subscribed to the summons.

Unlike the common law writ, the initial process under the modern Code practice is not signed or sealed by the Court or its clerk but consists of a summons signed only by the plaintiff's attorney. In a strictly professional view this process is issued by the Court through the attorney acting as an officer of the Court but to the lay mind it seems only to require an answer to be made to the plaintiff's attorney and not to the Court. Such was evidently the view taken by Semon.

The following references to the Statutes of North Dakota will, however, show that every substantial requirement of the laws of that State as to appearance and answer was complied with by Semon.

Service by mail was proper (Sec. 5329; Transcript, p. 52).

The paper contained all that is required by the Dakota Code in relation to an answer to wit, a denial of the allegations of the complaint. Secs. 4914 & 4924, (Transcript, p. 51) which is the same in terms as Sec. 500 of the N. Y. Code, does not require the answer to contain any title or any prayer for relief, as the learned Surrogate seems to suppose, but only requires the above specified particulars, and the decisions are that an answer or appearance is sufficient, if it intelligently refer to the action in which it is interposed, as it did here.

Didier *vs.* Warner, 1 Code Rep., 42 (N. Y.)

And see

Sec. 5341 North Dakota Code and Sec. 728 N. Y. Code.

The paper was properly verified, and the learned Surrogate is in error in stating that it was not. Section

4922 of the North Dakota Code (Transcript, p. 51) is identical with New York Code, Section 526. The form used by this layman (Semon) has been held by the New York Court of Appeals to be a compliance with the statutes. The words "that it is absolutely true," are equivalent to "true to his knowledge."

Matter of Macauley, 94 N. Y., 574.

And any defect in the verification under the practice in all Code States does not make the pleading a nullity, but objection must be taken to the form of verification which may then be remedied. As the paper was not returned and no notice of any objections was given to Semon there was a waiver of any formal defect. Had any objection been made to the paper, and had notice thereof been given to Semon, he could have remedied the defect within the time to answer. Therefore said defendant Semon, having no notice of any informality, properly, as stated in his petition, (Transcript, p. 37) "believed that said answer so subscribed and sworn to by him and sent to plaintiff's attorneys would be filed in Court as part of the proceedings."

And the North Dakota Code (Sec. 4921, Transcript, p. 51) allows a pleading to be subscribed by the party, as this was.

Again, Section 5341 of North Dakota Code (Transcript, p. 52) provides that it shall not be necessary to entitle an affidavit in an action, but an affidavit made without a title, or with a defective title, shall be as valid and effectual for every purpose as if it were duly entitled, *if it intelligently refer* to the action or proceeding in which it is made." The New York Code contains a similar provision (Sec. 728, N. Y. Code).

And a pleading may be verified by affidavit (Sec.

5281, Transcript, p. 52). And the affidavit may be made out of the State before any person authorized to administer an oath (Sec. 5282, Transcript, p. 52).

II.—The attorney for the plaintiff was in error when he treated this paper as a nullity, and his error cannot make a valid argument against the sufficiency of the paper as an appearance and answer. The North Dakota Court has found by the amended decree that it was a good appearance and answer, and their *judgment* is of more importance than the act of the attorney.

In Laing *vs.* Rigney, 160 U. S., 531, which reversed Rigney *vs.* Rigney, 127 N. Y., 408, the Supreme Court of the United States commented upon the testimony of an expert witness, to the effect that under the practice in the State of New Jersey defendant was not properly served with supplemental process so as to be bound by a decree on a supplemental bill, and said, at page 543: "The opinion of the Chancellor differed from that of the witness, and what is more important, his *judgment* was that under the laws of the State of New Jersey the defendant was in his Court subject to his jurisdiction and bound by its decree."

The attorney said the paper was not in form of a pleading under the requirements of the Statutes of North Dakota (Transcript, p. 33), but the Statutes have been put in evidence here and analyzed above, and we find nothing in them to justify us in treating the conclusion of the Dakota Court that the answer was sufficient as wrong, and the contrary opinion of the attorney as right.

The paper could not mislead as to the intention of the defendant to deny the allegations of the complaint, and to put it in as formal and legal a shape by swearing to it, as it was possible for the defendant, acting without

legal assistance, to do. The learned Surrogate says "it was a mere verified letter," but we think the oath attached to this letter gave it the highest sanctity possible, and evinced unmistakably the intention of the writer to make it as formal and legal as it was possible for the lay mind to conceive. Oaths are used rarely, except in legal proceedings, and verification by oath is the common requirement for pleadings, other than demurrers, under Code practice (Sec. 4921; Transcript p. 51). A seal purports to the lay mind the highest solemnity, and such was evidently the idea of the defendant Semon in adding a seal to his name, and then swearing to the document. First he signed the letter, then he signed the oath and added his seal, and then he made oath to the truth of the contents of the document before a notary public. He probably knew that a paper to be used in Court proceedings must be sworn to. Swearing to the contents of the letter shows most clearly that what he said in his petition is true, to wit: That he prepared and sent said answer "with the intention to have the said "answer presented to this Court, so as to inform the "Court of your petitioner's position and defense in this "action, and to submit himself to the jurisdiction of the "Court herein, and to have his rights adjudicated by this "Court without incurring any expense in the matter" (Transcript, top of p. 37).

THIRD.

The North Dakota Court had power to amend the divorce decree *nunc pro tunc* and proceeded with due regularity in so doing, and its amended decree is binding on the parties and on third persons, including the defendants in error.

Notice of the application to amend the divorce decree was given to the plaintiff's attorneys therein, who admitted that they had duly received the appearance and answer aforesaid, and stated that the original was lost (Transcript, pp. 35 and 33). A copy of a lost paper may be filed. North Dakota Code, sec. 5339. (Transcript, p. 52.) N. Y. Code, sec. 726.

An order was thereupon made by the Court which granted the original decree, *acting through the Judge who signed that decree*, amending the same *nunc pro tunc*, as prayed for, and the amendment was accordingly made on December 16th, 1896, in and upon the face of the original decree.

The following are some of the provisions of the laws of North Dakota bearing upon the power of the Court in the premises: "The law respects form less than substance;" "an interpretation which gives effect is preferred to one which makes void" (Secs. 4715 and 4728; Transcript, p. 50.

"SECTION 4924. In the construction of a pleading "for the purpose of determining its effect, its allegations "shall be liberally construed with a view of substantial "justice between the parties."

"SECTION 4938. The court may, before or after judg- "ment, in furtherance of justice and on such terms as

"may be proper, amend any pleading, process or pro-
"ceeding, by adding or striking out the name of any
"party; or by correcting a mistake in the name of a
"party, or a mistake in any other respect; or by insert-
"ing other allegations material to the case; or when
"the amendment does not change substantially the claim
"or defense, by conforming the pleading or proceeding
"to the facts proved."

"SECTION 4939. The court may, likewise, in its dis-
"cretion, and upon such terms as may be just, allow an
"answer or reply to be made, or other act to be done after
"the time limited by this code or by an order, enlarge
"such time, and may also, in its discretion, and upon
"such terms as may be just, at any time within one year
"after notice thereof, relieve a party from a judgment,
"order, or other proceeding taken against him through
"his mistake, inadvertence, surprise or excusable ne-
"glect, and may supply an omission in any proceed-
"ing; and whenever any proceeding taken by a party
"fails to conform in any respect to the provisions of this
"code the court may, in like manner, and upon like
"terms, permit an amendment of such proceedings, so
"as to make it conformable thereto."

"SECTION 4941. The court shall, in every stage of
"action, disregard any error or defect in the pleadings
"or proceedings which shall not affect the substantial
"rights of the adverse party; and no judgment shall be
"reversed or affected by reason of such error or defect."

(Transcript, p. 51.)

"SECTION 5339. If any process, original pleadings
"or any other paper be lost or withheld by any person,
"the court may authorize a copy thereof to be filed and
"used instead of the original."

(Transcript, p. 52.)

Similar provisions are found in Secs. 723, 724 and 726 of the N. Y. Code. In Viadero *vs.* Viadero, 7 Hun, 313, Mr. Justice DANIELS, speaking of these sections, says: "These provisions are very broad. More comprehensive language could hardly have been selected."

Courts of record have inherent power, independently

of any statutory provisions therefor, to amend mistakes in thei records. Amendments made by Courts having jurisdiction cannot be collaterally attacked.

Pendleton *vs.* Weed, 17 N. Y., 72, 75, 79.
Bohlen *vs.* M. E. R. R. Co., 121 N. Y., 544, 550, 551.
Audubon *vs.* Ex. Ins. Co., 27 N. Y., 216, 221.
Maples *vs.* Mackey, 89 N. Y., 146.
Buckingham *vs.* Dickinson, 54 N. Y., 682.
Dalrymple *vs.* Williams, 63 N. Y., 361, 362.
N. Y. Ice Co. *vs.* N. W. Ins. Co., 23 N. Y., 357, 360, 361.
Delancey *vs.* Pipegras, 73 Hun, 607, 608.
Genet *vs.* D. & H. C. Co., 136 N. Y., 217, 220.

In delivering the opinion of the Court in the Audubon Case, 27 N. Y., at page 221 DENIO, *C. J.*, says:

"*The power to amend results from the jurisdiction* "*of the Court as a Court of record* (Lee *vs.* Curtiss, 17 "Johns., 86; Lansing *vs.* Lansing, 18 *Id.*, 502). In "courts of special and limited jurisdiction, not of record, "this rule is otherwise; and, hence, where a case was "tried before a Justice, without a jury, and he took time "to give judgment, it was held that the action could not "be discontinued, and that the trial was a bar, whether "any judgment was given or not. (Hess *v.* Beckman, "11 Johns., 457.) It is proper to say very distinctly, "in order to prevent misapprehension, that we give no "opinion upon the propriety or abstract legality of the "amendment which was made in the instance before us. "It, no doubt, required very peculiar circumstances to "be shown to render it proper to change the effect of a "judgment rendered upon the merits, upon a summary "application, in the manner pursued in this case. *All*

"that we decide in that respect is, that that Court hav-"ing the power to amend in a proper case, and having "amended this record, the amended judgment is the "only evidence we can receive as to the disposition of "the former action, and that as amended, the judgment "is not a bar to the present action," and that the Court had power to make the amendment *nunc pro tunc* cannot be doubted.

And the power to amend a judgment *nunc pro tunc*, so as to make the record declare the truth, has often been declared. In one of the following cases the amendments were allowed after appeal from the judgment as originally entered; in another after suit brought upon the basis of the original judgment.

Nat. City Bank *vs.* N. Y. Gold Ex. Bk., 97 N. Y., 645.

Toronto Gen. Trust Co. *vs.* C. B. & Q. R. R. Co., 123 N. Y., 37.

Matter of Miller, 70 Hun, 61.

And see Hatch *vs.* Cent. Nat. Bk., 78 N. Y., 487.

Brink *vs.* Brink, *supra.*

Ross *vs.* Hubbell, 1 Caines (N. Y.), p. 112.

The result is that, at a time when, and in a proceeding in which, the Dakota Court had jurisdiction of the parties to, and the subject matter of, the motion to amend the recitals in the original decree, as to whether the defendant had or had not appeared in that action prior to the entry of the decree therein, that Court did decide and enter in the decree in that action, that the defendant had so appeared. This embraced a decision of every question of law and fact involved in that question (Rich *vs.* Rich, 88 Hun, 566). This conclusively settled that, not merely at the time when the motion to

amend was made, nor merely when it was decided, but that prior to that time and at and from the time the defendant's letter to plaintiff's attorneys was received by them, and from then on, including the time when the original decree was entered containing a misrecital of defendant's non-appearance, the defendant had appeared, and that the Court had jurisdiction of his person in that action. This adjudication cannot be collaterally attacked, certainly without evidence that a fraud was perpetrated upon the North Dakota Court.

Laing *vs.* Rigney, *supra.*

Pendleton *vs.* Weed, 17 N. Y., 72, 74, 75, 79.

Lythgoe *vs.* Lythgoe, 75 Hun, 147.

Rich *vs.* Rich, 88 Hun, 566.

FOURTH.

The Surrogate erred in finding as a matter of fact that Semon did not appear in the action (6th assignment of errors, Transcript p. 80).

I.—The Surrogate found as a matter of law that the amendment proceedings were null and void (Transcript, p. 56).

Treating the case, then, *as containing only the original decree,* the amended decree being in his view a nullity, he found as a fact that Semon did not appear in the divorce action (Transcript, p. 53). This was a logical sequence from the false premise that the amendment was void. The Appellate Courts of New York, however, re-

fused to consider the legal conclusion of the Surrogate that the amendment proceeding was void, but put their decision squarely on the ground that the Surrogate had found the fact to be that Semon had not appeared and that as Appellate Courts they could not review a question of fact (Transcript, p. 72, last half; Transcript, p. 85, last half).

In Laing *vs.* Rigney, *supra,* this Court said: "The plaintiff duly excepted to the findings and conclusions, and it is well, settled that exceptions to alleged findings of fact unsupported by evidence present questions of law reviewable in Courts of error."

The Surrogate based his finding of the fact that Semon did not appear in the divorce proceeding on no evidence whatever, but solely upon his conclusion of law above referred to. He said in his opinion: "Moreover I am "of the opinion *upon the undisputed facts* that the "North Dakota Court had no jurisdiction to make the "amendment."

Here, then, we have a case of "*undisputed facts,*" and consequently we have a question of law which the Appellate Courts should have passed upon, but did not, to wit: "Is the amendment proceeding void?"

The Courts of New York recognize in many cases the true rule as expressed in Laing *vs.* Rigney, just referred to, but refused to apply it in the case at bar.

Matter of Green, 153 N. Y., 223.
Matter of Clark, 119 N. Y., 427-433.
Sherman *vs.* R. R. Co., 64 N. Y., 654.

II.—By the eighth of his findings of fact the Surrogate found, expressly and in detail, what the defendant in that action did. He found that the said defendant sent a verified letter to the plaintiff's attorneys in that

action and that said defendant claimed said letter was an answer in that action, and that its sending by him and its receipt by those attorneys was an appearance and answer by him in that action as of the date of its said receipt. He further found that said defendant upon that ground applied to said Court to amend the decree in that action, *nunc pro tunc,* by striking out the recitals in that decree of his non-appearance and failure to answer in that action and by inserting therein a recital that he had appeared and answered therein at the date said letter was so received by said plaintiff's attorneys. He also found that said Court granted said application and amended said decree accordingly. The records of the Court in these proceedings are in the case at p. 32 *et seq.,* of the Transcript.

They were put in evidence before the Surrogate (Transcript, p. 45).

The general finding of the Surrogate that there was no appearance is controlled by these specific findings. Plaintiff in error is entitled to the construction of those findings most favorable to him if they conflict.

Mahl *vs.* Barnum, 116 N. Y., 87.

III.—In view of this condition of the findings and evidence it is clear that the finding that the defendant did not appear in said action, either in person or by attorney, is not a finding of fact, but is a finding of law as to the legal effect of those facts, a mere legal construction of their effect, and if erroneous is reviewable by Courts of Error.

FIFTH.

The contention that the decree of divorce having been amended after intestate's death, the amendment could not affect defendants in error's rights which vested at the time of such death is not well founded.

I.—One fallacy of defendants in error in their contention on this point lies in the assumption it involves, that the jurisdiction of the Dakota Court accrued only when the defendant in the action therein moved to amend the decree of divorce, and that the divorce itself didnot become valid until such amendment was made. The truth is, it accrued when the plaintiff's attorneys in that action received the verified letter sent them by Semon. Such was the decision of the Court by granting the amendment *nunc pro tunc.* From the time of the entry of the decree in the first instance until the amendment of it the decree of divorce was not void, nor the Court without jurisdiction. During that time such decree was only apparently void, by reason of a misrecital on its face, which was amendable. The jurisdiction of the Court depended on the actual facts and law as to the appearance, and not on the erroneus recital in the decree. When those recitals were amended *nunc pro tunc,* the decree was merely made to show on its face what had all the time been the truth, that the Court had jurisdiction, and the decree was valid *ab initio.* In the meantime the misrecitals therein merely affected the effect of the decree as matter of evidence, and not as matter of substance.

Audubon *vs.* Ex. Co., 27 N. Y., 216, 221;
Opinion Denio, *C. J.*
Maples *vs.* Mackey, 89 N. Y., 146.
Produce Bk. *vs.* Morton, 67 N. Y., 199, 202.

II.—The rule of law sought to be invoked has no application to the facts of the case at bar. It applies only to cases in which prior to the amendment being made rights have accrued to some person by reason of his having acted on the faith of the decree as originally entered. The principle is that of estoppel. Defendants in error did no act, and acquired no rights by any act done, on the faith of the decree of divorce. The intestate in whose right alone defendants in error have any standing, did no act on the faith of that decree which makes the doctrine of estoppel applicable. It is found that at the time Kimball married the appellant he knew she was a divorced woman. He married her on the faith of the validity of that decree and not on the faith of its invalidity. To hold it valid, as he assumed it to be, and acted on the faith of it being, violates no rule of estoppel. The only fact giving the defendants in error any rights in the premises is the death of intestate. That was no act at all of defendants in error and it was no act of any one's done on the faith of this decree, either as a valid or invalid one.

III.—Moreover, the rule sought to be invoked applies only to cases in which rights have accrued, not only prior to the amendment and subsequent to the decree, but also to *bona fide* third parties and upon a valuable consideration. Such is not the defendants in error's position. They merely succeed to the intestate's rights and stands on his rights. They parted with nothing on the faith of this decree as unamended. They knew the appellant had been divorced. They were chargeable with intestate's knowledge of that fact. They were put on inquiry. Inquiry of the attorneys for the plaintiff in that action would have disclosed all the facts. In-

quiry of the defendant in that suit would have disclosed them. Defendants in error are neither *bona fide* third parties nor parties who have parted with any consideration.

Sears *v.* Burnham, 17 N. Y., 445, 448, 449.

IV.—Defendants in error are not, likewise, in the position of a creditor who by diligence has acquired a lien, as in the cases cited by their counsel, where amendments of prior proceedings such as would defeat the lien have sometimes been denied. All such cases are cases of specific lien by attachment or execution, to avoid or sustain which amendments were sought. Here no question of title to or lien upon specific property arises. They have no process against or lien upon the decedent's property, but claim by operation of law as next of kin of an intestate. Neither are defendants in error right in claiming that notice to them of the proposed amendment was necessary. Where property is seized under several processes of the Court all claimants are entitled to notice of proposed amendments affecting the validity of any of the proceedings so far as it affects the property levied upon, and such are the cases cited by them. It is difficult to apprehend on what principle they should be called into the North Dakota Court, when it was proposed to amend the decree of divorce, a matter to which they are strangers, and which affects no lien or process of theirs. They were not known to Semon, and it was impossible to give notice to the world at large.

In certain cases *bona fide* purchasers and mortgagees without notice may acquire rights which the Courts will protect in allowing amendments of their record *nunc pro tunc*. But here the next of kin do not claim to have

parted with any value on the faith of the original record of divorce. They simply claim the property of the deceased by operation of law. They, therefore, have no equity which the Court of North Dakota, or this Court, is called upon to protect.

No cases are cited by defendants in error except a line of cases where at the instance of junior judgment creditors prior confessions of judgment have been held invalid as to the former. Such confessions are strictly statutory, and if not strictly regular, are void.

Dunham *vs.* Waterman, 17 N. Y., 9.

V.—Defendants in error claim that they acquired rights which could not be impaired by an amendment of the divorce decree after the death of Mr. Kimball without a hearing, but they had, and have, acquired no such rights. They never had any rights to have plaintiff in error adjudged to be still the wife of Semon. Plaintiff in error, however, has always been, as now, entitled to have the divorce record accord with the fact and show the appearance of Semon in that suit.

VI.—The defendants in error cannot effectually insist that they have any rights which depend for their existence upon the right, if, any, of plaintiff in error to object to the validity of the divorce decree.

Plaintiff in error not only does not object to, but insists upon the validity of that decree. She has no legal right to object thereto.

Rigney *vs.* Rigney, 127 N. Y., 408, 413.
Kinnier *vs.* Kinnier, 45 N. Y., 535, 539.

That the decree was amended only on notice to her attorneys in that action, and not on personal notice to her,

if that be assumed to be the fact, is of no consequence in this action. That motion was based on a petition and an order to show cause which were duly served on said attorneys, and they gave an admission of the service thereof. The order to amend was based on said petition, order to show cause, admission of service, and also on an affidavit made and filed by one of said attorneys for said plaintiff. That order to amend does not say that no one appeared for plaintiff on the motion, but only that no one appeared *in opposition* to the motion. It is perfectly consistent with an appearance without opposition. It is like an appearance in an action and default in answering.

The acceptance and admission of service of the motion papers and the filing of an affidavit was an appearance by those attorneys for plaintiff on that motion, even though they did not appear in opposition to it. Such appearance was presumptively authorized by her. No evidence whatever was offered or given herein to prove that such appearance for her was unauthorized by her. The finding that the order was made on default, is not a finding that it was made on default of appearance without due service of notice, but is merely a finding of such a default as the order itself recites to wit, a default in opposition.

The plaintiff in that action is the plaintiff in error herein. She does not dispute that said appearance was authorized and is in this proceeding claiming the benefit of the order based upon it. Not only is there an utter absence of any proof of want of authority to appear, but, if there were, the acts of plaintiff are a ratification of the appearance equally effectual as original authority would have been.

The appearance so made cannot be collaterally attacked.

Matter of Stillwell, 139 N. Y., 337, 340, 341.
Brown *vs.* Nichols, 42 N. Y., 26.
Denton *vs.* Noyes, 6 Johns., 296.

SIXTH.

Irregularities, if any, do not affect the validity of the divorce decree as amended.

The Surrogate was of opinion that if the letter was regarded as a pleading, then an issue was raised which entitled the defendant to a trial (Transcript, p. 54).

That is true. The defendant raised an issue and was entitled to a trial thereof upon notice, but he was not given the notice to which he was entitled. He answered the complaint on October 23d, 1890, and never heard any more about the suit until December, 1896, when he learned that a decree of divorce had been entered reciting his default. He did not desire after the lapse of the six years since the filing of his answer to proceed with the trial of the issues, but, as the conditions had changed, he desired the fact of his appearance in the suit to be stated, and the decree thus made of such effect as that he could remarry. He alleges in his petition that his former wife, the plaintiff in error, had again married and that he was advised that he could not remarry if it appeared that he had not appeared in the divorce action (Transcript, p. 37). Under the decisions in New York a conviction for bigamy is upheld against one marrying a second time where not actually appearing, or served

with process within the State, in a divorce action brought by a former spouse.

People *vs.* Baker, 76 N. Y., 78.

The trial of the issues might have been insisted upon by the defendant, but he waived that and only asked the Court to amend its record as stated. This waiver of trial, six years after raising the issues, was not remarkable, and the right of defendant to so waive his rights cannot be doubted. The Court would have granted a trial, no doubt, had he demanded it in his petition, but he did not, and demanded only the amendment actually made.

Even if the proceedings of the North Dakota Court were irregular as to trial of issues, or otherwise, which we deny, the irregularity could not avail in a collateral proceeding, as it is only for *want of jurisdiction* that the divorce decree can be so attacked.

Laing *vs.* Rigney, 160 U. S., 531 (quotation *supra,* p. 24).

Gunn *vs.* Plant, 94 U. S., 664.

SEVENTH.

There is no warrant in the pleadings or evidence herein for any attack upon the good faith of the parties to the divorce proceedings.

The Surrogate's finding, Fifth, to the effect that petitioner went to North Dakota for the purpose of procuring the divorce, has absolutely no evidence to support it..

I.—There is absolutely no fact proven in the case at bar which justifies the remarks of counsel for defendants' in error as to those matters. The decree of divorce recites the *bona fide* residence of petitioner in North Dakota, and it is admitted that she was living in that State from June 5th, 1890, to February 5th, 1891, a period of eight months; and what longer time she lived there does not appear. We were asked by defendants' in error to admit that petitioner was living in North Dakota between those dates, and we so admitted; but that admission does not exclude her having lived there before or after the dates mentioned.

In the McGowan case cited below by defendants' in error, question of domicile was raised *by the husband*, who claimed that he was not bound by the North Dakota decree, and proofs were adduced. Ninety days' residence is all that is required by the laws of North Dakota, and the plaintiff in error was there for at least eight months. When third parties attack by proceedings in this State a divorce decree of a foreign jurisdiction, the Court of Appeals holds that the determination of the foreign Court as to residence or domicile of a person actually within its jurisdiction cannot be successfully assailed.

Kinnier *vs.* Kinnier, 45 N. Y., 535-540.

The *bona fides* of plaintiff in error's eight months' residence is not attacked here *by any proof whatever.*

This being so, the Court is bound to assume on the evidence, as well as under the authorities, that plaintiff in error was a *bona fide* resident of North Dakota.

II.—Another innuendo, without evidence to support it, which counsel for the defendants' in error endeavored

to make much of, is that the story that Semon ever sent the letter referred to in the amendment proceedings is untrue. This he bases, first, on the fact that the letter is addressed to "Herman Winterer" one of plaintiff's attorneys and not to "Winterer & Winterer," plaintiff's attorneys. We could have met any evidence that the letter was not such as it purported to be, and could have satisfactorily explained how it came to be addressed as above. The fact is that the summons and complaint were bound in a cover containing a printed endorsement of the name of "Herman Winterer" along with his address, and that Semon took the name and address from that.

Secondly, counsel for defendants' in error claims, that Semon, and the attorney Winterer, must have stretched their consciences in order to swear that the copy of the letter produced in the amendment proceedings was an exact copy of a letter purporting to have been sent six years before. As remarked before, had attack by evidence been made upon the good faith of the proceeding for amendment, we could have shown the facts. Semon may have preserved a copy of his letter. The plaintiff in error saw the letter when it was received by her attorney, Mr. Winterer. The Notary who took the affidavit in 1890 is living in New York, and he could have been called to prove the truth of the verification *had any attack been made.*

III.—Counsel for defendants' in error likewise lays stress upon the strong criticism of the good faith of the amendment proceedings made in the Appellate Division opinion, to wit: "The story of his appearance and answer is apocryphal and challenges credulity and the Surrogate appears to have been of this opinion."

There being no evidence to challenge the veracity of Mr. Semon, and the defendants' in error having made no attack before the Surrogate upon the good faith of the amendment proceedings, we regard the sentence quoted above as the most remarkable language ever appearing in a judicial opinion. The Surrogate's opinion as expressed in his findings is that (Transcript, p. 56, Finding 8), "Semon applied to the Court to have a letter which HE SENT to the plaintiff's attorney after receiving the summons in the divorce suit filed *nunc pro tunc.*"

The opinion of the Surrogate, as well as the above finding, is also entirely at variance with any idea that he did not believe that Semon sent the letter. His opinion discusses the letter *only as actually sent.* He says:

"The letter which is in evidence and referred to as "constituting the appearance of the defendant is not "in any sense or upon any theory of practice an appear- "ance in the suit. It is not entitled, is improperly veri- "fied, contains no demand for relief, and does not even "contain any intimation of any intention on the part "of the defendant to appear and submit himself to the "jurisdiction of the Court. It is a mere verified letter "and nothing more.

"But, if it has any force whatever in the suit, it is a "pleading which raises an issue which entitled the de- "fendant to a trial upon some sort of notice to him. "The record does not show any such notice."

There is, therefore, absolutely no ground for saying that the Surrogate did not believe the story. The Court of Appeals in the majority opinion treat the letter as actually sent. They inserted the letter *in extenso* in their opinion (Transcript, p. 84), and discussed the alleged legal defects therein. They threw no doubts upon its history as claimed by Semon.

Chief Justice PARKER in the ~~discussing~~ dissenting opinion refers

to this attempt to discredit the unchallenged evidence as follows:

"But the motion to amend the judgment, made by "the defendant in that action after the death of the "intestate, Kimball, seems to have aroused suspicion "that there was some collusion between Semon and his "former wife and that his action was taken for her bene- "fit, and not for his own, as he swears. There is, how- "ever, no proof that this suspicion is well founded, but "if it were otherwise it could not affect the question "before us, which is whether the Dakota Court had "before it competent evidence upon which to base the "determination that it had jurisdiction of the defendant "Semon at the time of the entry of the judgment, and "authority to amend the decree as of that date, so that "it should show such jurisdiction. The evidence upon "which the Court based its decision allowing the amend- "ment is before us, and it cannot be said that it does "not furnish support for the determination of the Court.

"The defendant Semon, who undertook to answer in "that action within the time mentioned in the summons "and subsequently insisted upon such an amendment of "the decree as should recite the fact of his submission "to the jurisdiction of the Court, does not challenge its "jurisdiction. That is attempted by a third party, "who produces no other evidence than that submitted "by Semon to the Court in his petition praying for such "an amendment as should recite the jurisdictional facts "which existed when the decree was first made. *No "prior case can be found where it has been held that in "such a situation an adjudication of personal appear- "ance can be disregarded, when collaterally attacked "by a third party, and the Court, of its own head, hold "otherwise.*"

EIGHTH.

The defendants in error having admitted the ceremonial marriage of the petitioner to Edward C. Kimball, the deceased, the burden is upon them to prove that the marriage was not valid.

The presumption in favor of the validity of an actual ceremonial marriage is one of the strongest known to the law (Schmisseur vs. Beatric, 147 Ill., 210), and the burden is with the party attacking such validity.

Bishop on Marriage and Divorce, Secs. 457. 458.

1 Greenl. Ev., Sec. 33, 35.

The occurrence of the second marriage also brings into existence the presumption that the parties to it are innocent of the crime of bigamy or adultery.

Johnson *vs.* Johnson, 114 Ill., 611.

1 Bishop Mar., Div. & Sep., Ed. 1891, Secs. 949-955.

Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the Courts have often indulged in the presumption, where the absent party is shown to be alive, that such absent party has procured a divorce.

It is not enough to impeach the validity of a marriage to show that one of the spouses has a husband or wife still living. The presumption that the former marriage has been legally dissolved must be overcome.

Wenning *vs.* Teeple (Ind. Sup.), 41 N. E., 600.

This presumption, expressed in the maxim "*semper pro matrimonio*" is universally recognized. Every inducement of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a strong presumption of its legality;—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of this presumption, the truth of law and fact that it is illegal and void. And the strength of the presumption increases with the lapse of time through which the parties are cohabiting as husband and wife. It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes in form matrimonial should be such in fact;—the law, when administered by enlightened judges, seizes upon all probabilities, and presses into its service all things else which can help it, in each particular case, to sustain the marriage, and repel the conclusion of unlawful commerce.

Bishop, Mar. & Div., Sec. 956.

NINTH.

The foregoing argument has been confined to a discussion of the effect of the decree of the North Dakota Court *as amended*.

This argument will, however, be accompanied by a separate and special brief of associate counsel devoted wholly to the consideration of the effect of the decree of that Court *as it was originally entered*.

The extraordinary importance of the question of the extra-territorial effect of divorces obtained by constructive service is, we submit, sufficient for treating that point in a separate brief.

TENTH.

We respectfully submit that the decree of the Surrogate's Court should be reversed with costs.

WALDEGRAVE HARLOCK,
GEORGE BELL,
For Plaintiff in Error.